Filed 6/21/10 In re D.B. CA1/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

In re D.B. et al., Persons Coming Under the Juvenile Court Law.	
DAVID B. et al., Petitioners, v. THE SUPERIOR COURT OF HUMBOLDT COUNTY, Respondent; HUMBOLDT COUNTY DEPARTMENT OF SOCIAL SERVICES, Real Party in Interest.	A128307 & A128314 (Humboldt County Super. Ct. Nos. JV 080005 & JV 080006)

In this juvenile dependency writ proceeding, the parents argue that the trial court's decision to bypass further reunification services was based on inadmissible and inadequate evidence, and that the parents' failure to complete a court-ordered substance abuse assessment did not amount to a failure to comply with a drug abuse treatment plan. We reject all of these arguments, and deny the writ.

FACTS AND PROCEDURAL BACKGROUND

The minors involved in these writ proceedings are D.B., who was born in the fall of 2000, and T.B., who was born in the summer of 2005. Their mother (mother) is

petitioner T.U., and their presumed father (father) is petitioner David B.[1] Mother gave birth to D.B. when she was 17 years old and father was 21 years old.

Respondent Humboldt County Department of Health and Human Services (DHSS) initially removed the minors from the custody of mother and father (collectively, parents) on January 8, 2008, and filed dependency petitions on January 10, 2008. The removal was based on allegations of abuse of D.B. by father, arising out of an incident in which D.B. was burned while father was trying to discipline him for playing with fire, and neither parent took D.B. to a doctor or hospital for treatment. The petitions also alleged neglect of D.B. by both parents; and risk to T.B. due to parents' abuse and neglect of his brother. Neither the petitions nor the accompanying detention report relied on any allegations of substance abuse by either parent, and the detention order did not require any drug abuse treatment. The minors were placed with father's mother.

On February 13, 2008, after a hearing, the court approved a "safety plan" to which parents had agreed, under which parents would attend parenting classes and receive other services and visitation, with a view to returning minors to their parents' care at the disposition hearing if parents had complied with the plan in the interim. The safety plan required both parents to participate in four drug screenings during the remainder of the month, and provided that if a parent had positive results from the screenings, he or she would be required to sign up for a substance abuse assessment prior to the disposition hearing.

On March 6, 2008, the court held a hearing at which mother's marijuana use was discussed.[2] At that hearing, the court ordered both parents to drug test whenever

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[1] T.B. also has an alleged father, K.B., who is incarcerated and apparently has not been involved in T.B.'s life. K.B. was represented by counsel in the dependency court proceedings. He acknowledged that T.B. was his biological child, but he was not provided with any reunification services. In January 2010, DHSS received a letter from K.B. indicating that he would "do nothing to disrupt [T.B.'s] life," though he expressed interest in what he had been told about the boy by his own mother, and wanted to remain informed about him. K.B. is not a party to these writ proceedings. All references to "father" in this opinion are to David B.

requested by the social worker, and warned that "[f]ailure to test by either parent could be interpreted as a positive test." With that stipulation, the disposition hearing was continued to April 3, 2008. The disposition report filed for that hearing focused on parents' admitted "lack [of] appropriate skills in parenting." But the report also mentioned that parents had completed two of the required drug screenings, and that in the first test, father tested positive for methamphetamine, and mother tested positive for marijuana. The report stated that parents would be referred for further assessment regarding their drug abuse issues. The accompanying case plan included the following as a new provision: "Stay free from illegal drugs and show your ability to live free from drug dependency. Comply with all required drug tests." It also provided that parents would "participate in a substance abuse evaluation . . ., and . . . follow all recommendations." After the hearing, the court concluded that both parents had complied with their case plan and made adequate progress toward alleviating the causes of the dependency. The minors were ordered returned to parents' custody under a family maintenance plan.

On September 26, 2008, DHSS prepared a status review report for the six-month review hearing mandated by Welfare and Institutions Code section 364.[3] DHSS also prepared an addendum report for the same hearing, which was held on October 16, 2008. The reports indicated that both parents had been asked to undergo drug testing, but had delayed in doing so to the point where DHSS considered the tests positive even though the actual results were negative. Mother still had not had a drug abuse assessment, and told the worker she was unsure of how to do so. Father's most recent drug test in June was negative. However, he also had not completed the required assessment, reported that he did not believe he had a substance abuse issue, and could not explain why he had

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[2] Our record in this writ proceeding does not include a reporter's transcript of the March 6, 2008 hearing, and the clerk's transcript does not reveal how the subject of mother's use of marijuana was first raised.

[3] All further statutory references in this opinion are to the Welfare and Institutions Code unless otherwise noted.

tested positive in the past. DHSS described parents' participation in their case plan as "minimal," though they had attended some family therapy sessions, and requested that they receive six more months of family maintenance services. The family's amended case plan, which the court adopted, continued to include the requirement that parents be evaluated for substance abuse, follow all recommendations, and submit to random drug testing on request by minor's counsel or the social worker. Failure to test within 24 hours of a request was to be deemed a positive test.

On January 7, 2009, D.B. was removed from the home again after father lost his temper and hit D.B. in the head. This resulted in a bump and a bruise, which mother falsely told D.B.'s school had occurred while D.B. was "wrestling around" with his brother. Parents and the social worker agreed that D.B. would stay with his paternal grandmother for a week. On January 20, 2009, however, the grandmother reported to the social worker that she was unable to handle D.B. due to his behavioral problems. As a result, on January 23, 2009, DHSS filed a supplemental petition relating only to D.B., which did not include any allegations as to the parents' alleged drug abuse. On January 26, 2009, the court signed an order authorizing D.B.'s removal from parents' custody.

The detention report prepared on January 23, 2009, did not discuss parents' progress in complying with the drug abuse assessment portion of their case plan. On March 11, 2009, however, DHSS submitted a report (the first March 2009 report) indicating that although the family had "attempt[ed] to engage in services[, it] had yet to complete any of the case plan goals." The first March 2009 report opined that "the parent's [*sic*] substance abuse along with mental health and cognitive disabilities have impacted the parent's [*sic*] ability to successfully complete their case plan and to understand appropriate discipline." It indicated that father reported he had started using alcohol and drugs at age 14, but averred that he had stopped using substances at age 20, before D.B. was born, and had not had difficulty doing so once he made up his mind.

The first March 2009 report also stated, apparently based on an interview with mother, that mother had begun using methamphetamine and other illegal substances

during a rocky period in her relationship with father, and that her affair with T.B.'s biological father, who was her drug dealer, had occurred during that period. After she became pregnant, however, she returned to father. Mother also reported that "she still struggle[d] from time to time with her sobriety[,] especially when stressed." Parents' case plan, which the court adopted as an order, continued to require that they participate in a substance abuse evaluation, follow all recommendations, and randomly test on request, with the proviso that failure to test within 24 hours of the request would be deemed a positive test.

On March 18, 2009, the dependency court sustained the supplemental petition, as amended on February 27, 2009, and ordered that D.B. be placed in a suitable foster home. On March 25, 2009, DHSS prepared a report relating to T.B. (the second March 2009 report), in anticipation of the six-month review hearing scheduled for April 2, 2009. At that time, T.B. was still living with parents. The second March 2009 report indicated that on February 5, 2009, parents were asked to undergo drug testing. Although parents were advised that a failure to comply with the request would be considered a positive test, they did not submit to testing and declined to provide an explanation for their failure to do so. The request was repeated on February 9, 2009, and again parents failed to comply. On February 27, 2009, mother reportedly admitted to the social worker that "she sometimes still uses methamphetamines when she is upset and stressed out." The report stated that parents were participating in parenting classes and counseling, and had made some progress on their case plan, but were not currently enrolled in any drug services.

The second March 2009 report indicated that father had said he was not able to undergo a drug assessment through the county "because he is fearful who he would run into." In order to accommodate that concern, father was permitted to address his substance abuse concerns through counseling and random drug testing. He had not been attending counseling services, however, and had failed to submit to drug testing on three occasions in February 2009.

On June 8, 2009, DHSS reported that parents still had not completed a drug abuse assessment, and that in the past 90 days, the social worker had asked the parents to drug

test 16 times, but they had only complied with the request twice, even though they were aware that noncompliance would be treated as a positive test. When they did comply, the results were negative.

Similarly, separate status review reports prepared for each minor[4] in September 2009 indicated that parents still had not submitted to a substance abuse assessment, and still were not engaged in substance abuse services. They had been asked to drug test 18 times in the previous six months, but had only complied three times, always with negative results. Their attendance at parenting classes and counseling had been sporadic, and they had not managed to complete a parenting class. DHSS opined that parents' "unaddressed drug use, mental health concerns, and need for assistance with parenting" continued to place T.B. at risk. It expressed concern about parents' failure to participate in substance abuse services even after the court had ordered them to do so on three separate occasions starting almost 18 months earlier.

At review hearings for each minor held in October 2009, the court ordered that parents continue to receive services, and set the cases for further review hearings in the spring of 2010. On December 18, 2009, however, DHSS filed subsequent petitions for both minors. The petitions alleged that parents were asked to drug test on December 14, 2009, and failed to do so. On the following day, parents allegedly admitted to a peace officer that they had recently used methamphetamine. The police searched parents' home, found methamphetamine, prescription drugs, and drug paraphernalia, and arrested both parents. In addition, the conditions in the home were unsuitable for a child; it was filthy; there was no hot water; and there were drugs, drug paraphernalia, and knives within the reach of T.B., who was then four years old. In addition, parents were unable to arrange suitable care for T.B. in the wake of their arrest. T.B. was placed in a temporary foster home, with a view to moving him into the same foster home as D.B. at a later time.

[4] The minors' cases were being handled separately at this point, as T.B. was still living with parents, while D.B. had been placed in foster care. Parents reported that their need to find childcare for T.B. was hampering their efforts to participate in the services offered to them by DHSS.

At a contested jurisdiction hearing on January 11, 2010, the dependency court found the allegations of the petition true by a preponderance of the evidence.

The court held a contested dispositional hearing on both minors' cases on March 23, 2010 (the March 2010 hearing).[5] Well before the March 2010 hearing, parents were served with a disposition report prepared on February 10, 2010 (the February 2010 report).[6] The February 2010 report summarized an interview with mother on December 30, 2009, during which she averred that she had only used methamphetamine "once or twice," and that the methamphetamine found at the house belonged to father and a man who was staying with them. Mother also reportedly stated that her "drug of choice" was marijuana, and that she had used it "for her nerves" on December 14, 2009, just before a visit by two DHSS social workers. The February 2010 report also summarized an interview with father on January 14, 2010. It noted that father contended there was less methamphetamine in the house than the police reported finding, but admitted that he had used methamphetamine increasingly often during the dependency proceedings, attributing this behavior to DHSS's " 'demands' " on the family.

The February 2010 report opined that parents had "a history of inappropriate parenting, substance abuse and mental health concerns." It noted that they had received more than 20 months of services, yet they still had not completed the drug abuse assessment, parenting education, and mental health services requirements outlined in their court-ordered case plans. The report stated that parents had "a history of extensive, abusive, and chronic use of drugs and have failed and refused previously to comply with a program of drug or alcohol treatment described in their [c]ourt[-]ordered case plans since 2008." It concluded that there was "no substantial probability" that parents would

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[5] The clerk's minutes for this hearing list only D.B.'s name and case number, but the reporter's transcript clearly indicates that the hearing related to both cases. The events at the March 2010 hearing are described in more detail in the discussion, *post.*

[6] The February 2010 report was received by the dependency court on February 10, 2010, but not formally filed until April 2, 2010.

be able to reunify with their children, and recommended that services be terminated and that the court set a section 366.26 hearing.

On April 2, 2010, after receiving post-hearing letter briefs, the dependency court entered orders finding that: (1) parents had made only minimal progress on their case plans; (2) parents had a history of extensive, abusive, and chronic use of drugs or alcohol and had failed or refused to comply with a treatment program described in their case plan on at least two prior occasions; and (3) there was clear and convincing evidence that returning the minors to parents would create a substantial risk of detriment to their safety, protection, or physical or emotional well-being. The court continued the minors' placement in foster care, denied further reunification services as not being in the minors' best interests, and set the permanency planning hearing under section 366.26 for August 2, 2010. Each parent filed a timely writ petition seeking review of the orders, and this court consolidated the petitions on its own motion.

DISCUSSION

"As a general rule, reunification services are offered to parents whose children are removed from their custody because the law strongly prefers maintaining the family relationship if at all possible. [Citations.] Limited exceptions to this general rule—termed reunification bypass provisions—are listed in section 361.5, subdivision (b). [Citations.]" (*Mardardo F. v. Superior Court* (2008) 164 Cal.App.4th 481, 485.) "Section 361.5, subdivision (b) lists a number of situations in which reunification services are likely to be futile and need not be offered to a parent. [Citation.] These exceptions to the general rule reflect a legislative determination that in certain situations attempts to facilitate reunification do not serve the child's interests. [Citation.] When the juvenile court determines by clear and convincing evidence that one of the enumerated situations exists [citation], reunification services shall only be ordered if 'the court finds, by clear and convincing evidence, that reunification is in the best interest of the child.' (§ 361.5, subd. (c))." (*D.B. v. Superior Court* (2009) 171 Cal.App.4th 197, 202.)

In this case, the dependency court denied reunification services to parents under subdivision (b)(13) section 361.5, (section 361.5(b)(13)), which applies when "the parent

or guardian of the child has a history of extensive, abusive, and chronic use of drugs or alcohol and has . . . failed or refused to comply with a program of drug or alcohol treatment described in the case plan required by [s]ection 358.1 on at least two prior occasions, even though the programs identified were available and accessible." In their writ petitions, parents challenge the order denying reunification services on three grounds: (1) the court's finding as to parents' drug abuse histories was based almost entirely on hearsay contained in documents in the court's file, of which the court improperly took judicial notice for the truth of their contents; (2) the court's finding that parents had a history of extensive, abusive, and chronic use of drugs or alcohol was not supported by clear and convincing evidence; and (3) the statutory requirement that parents must have "failed or refused to comply with a program of drug or alcohol treatment described in [parents'] case plan" was not satisfied, because parents were only ordered to complete a drug abuse *assessment*, not a program of drug *treatment*.

A. Reliance on Hearsay Evidence

At the outset of the March 2010 hearing, counsel for DHSS stated that she intended to call the social worker to testify. Each parent's counsel objected, contending that the purpose of the hearing was only to present legal argument, and that DHSS should not be able to present any testimony, as its counsel had not indicated in her pretrial statement that she intended to do so. The judge asked mother's counsel whether he was "prepared to submit the matter on the disposition reports," and mother's counsel agreed. The judge asked DHSS's counsel whether she was satisfied with having the court consider the disposition report, and whether she wanted the court to take judicial notice of "the remainder of the [c]ourt's file," and she responded affirmatively. The judge remarked that it "sounds like everybody agrees we've got all the evidence that we need and we just need to argue the matter," and father's counsel agreed that this was the case.

The parties then proceeded to present argument. Counsel for DHSS started by outlining the history of the case, as set forth in the various disposition reports previously filed. As she proceeded, parents' counsel objected to her reliance on hearsay information in earlier reports that had not been the subject of an express factual finding by the court,

contending that this material was not properly the subject of judicial notice. In response, the judge pointed out that parents had not objected to the information at the time, even though they had an opportunity to do so, and permitted DHSS's counsel to continue with her presentation. When their turn to argue came, both parents' counsel contended that the evidence summarized by DHSS's counsel was not sufficient to show chronic drug abuse. Neither parent testified or called any witnesses.

Parents now characterize the court as having taken judicial notice of the entire file in the dependency proceedings in order to arrive at its finding that parents had a history of extensive, abusive, and chronic drug use. Parents assert that this was error. We disagree with parents' characterization of what the trial court did, and find no error in what actually occurred.

Although the dependency court judge stated during the March 2010 hearing, somewhat loosely, that he was prepared to take judicial notice of the court's "file," it is clear from the argument at that hearing that DHSS was not relying on the court's entire file, but only on certain portions of it, to wit, the various reports submitted to the court by the DHSS social workers. It is well established that reports generated by social services agencies in juvenile dependency cases are admissible evidence, at both the jurisdiction and disposition stages of the proceedings, even though they may contain hearsay and multiple hearsay. (*In re Malinda S.* (1990) 51 Cal.3d 368, 375-382, partially superseded by statute as stated in *In re Lucero L.* (2000) 22 Cal.4th 1227, 1240-1242; *In re Keyonie R.* (1996) 42 Cal.App.4th 1569, 1571-1573.)

Moreover, DHSS's argument at the March 2010 hearing focused on facts that either were not subject to dispute—for example, that parents had been ordered to submit to drug testing; had been advised that failure to do so would be treated as a positive test; and had been ordered to undergo a drug abuse assessment—or that could easily have been countered by parents' own testimony if they were untrue—for example, parents' repeated failure to test, or their admissions to the social workers about their use of drugs. Parents did not choose to contest these facts either at the March 2010 hearing or at any

earlier stage of the proceedings. Thus, we perceive neither a violation of the hearsay rule, nor a violation of due process, in the dependency court's reliance on these facts.

B. History of Extensive, Abusive, Chronic Drug Use

The trial court found that parents had a history of extensive, abusive, and chronic drug use. Parents argue that this finding was not supported by clear and convincing evidence, as section 361.5(b)(13) requires.

" 'On review of the sufficiency of the evidence, we presume in favor of the order, considering the evidence in the light most favorable to the prevailing party, giving the prevailing party the benefit of every reasonable inference and resolving all conflicts in support of the order.' [Citation.] Section 361.5, subdivision (b) requires bypass findings to be supported by clear and convincing evidence. ' "The sufficiency of evidence to establish a given fact, where the law requires proof of the fact to be clear and convincing, is primarily a question for the trial court to determine, and if there is substantial evidence to support its conclusion, the determination is not open to review on appeal." [Citations.]' [Citation.] Thus, on appeal from a judgment required to be based upon clear and convincing evidence, 'the clear and convincing test disappears . . . [and] the usual rule of conflicting evidence is applied, giving full effect to the respondent's evidence, however slight, and disregarding the appellant's evidence, however strong.' [Citation.]" (*In re Angelique C.* (2003) 113 Cal.App.4th 509, 519.)

Under this standard, there is sufficient evidence to support the dependency court's finding. While the facts regarding parents' drug use here may not be as extreme as in some dependency cases, both parents admittedly used methamphetamine before T.B. was born, and the issue of drug abuse was raised in the dependency court almost from the beginning of the proceedings. In February 2008, shortly after the minors were first detained, both parents agreed, as part of a court-approved safety plan, to participate in drug screenings and to sign up for a substance abuse assessment if any of the tests were positive. In March 2008, mother's use of marijuana was brought to the court's attention, and both parents were ordered to submit to drug tests on request by the social worker, and warned that failure to test on request could be interpreted as a positive test. The

disposition report filed in April 2008 included reports that father had tested positive for methamphetamine, and mother for marijuana. After that, although the few drug tests that parents actually completed were all negative, parents repeatedly failed to test when DHSS requested them to do so.

In early 2009, mother admitted to DHSS that she still struggled from time to time with sobriety, and sometimes used methamphetamine when she was upset or stressed. Moreover, parents never contested DHSS's position that a substance abuse assessment was appropriate in their case, yet they never fulfilled that requirement, nor did they ever participate in any substance abuse treatment.

Finally, when the police searched parents' home in mid-December 2009, they found abundant evidence of current methamphetamine use. When parents were interviewed by DHSS after they were released from jail, they admitted their drug use to the social worker. This history is sufficient to justify the trial court's finding regarding parents' history of drug abuse. (Cf. *In re William B.* (2008) 163 Cal.App.4th 1220, 1229-1230 [where father began using methamphetamine again after participating in drug abuse treatment, father's behavior demonstrated resistance to treatment, and denial of reunification services under section 361.5(b)(13) was proper].)

C. Failure to Complete Drug Treatment

In *D.B. v. Superior Court*, *supra*, 171 Cal.App.4th 197, a father was denied reunification services based on his failure to comply with a drug treatment program ordered by parole authorities in connection with the father's criminal sentence, rather than by the dependency court in his child's case. Nonetheless, the court concluded that the dependency court did not err in applying section 361.5(b)(13). After reviewing the legislative history and purpose of the statute, the court concluded that construing the statute broadly, to encompass treatment ordered as a condition of parole, was consistent with the legislative intent. (*Id.* at pp. 203-206.)

The issue before us here is different. Parents argue that failure to comply with a drug abuse *assessment* requirement did not constitute failure to comply with a drug *treatment* program. Thus, although we construe the same statute involved in *D.B. v.*

Superior Court, *supra*, 171 Cal.App.4th 197, our focus is on the meaning of "treatment" rather than on the identity of the governmental body that ordered the parent to participate in it. Nonetheless, applying the analysis relied on in *D.B. v. Superior Court* leads us to the same result.

As counsel for DHSS pointed out to the dependency court at the March 2010 hearing, the order that parents undergo a substance abuse assessment was issued as the first step toward determining what type of treatment, if any, would be necessary and appropriate to address their substance abuse problems. Parents' argument that their failure to meet this requirement did not constitute failure to comply with a treatment program is entirely inconsistent with the overall purpose of the statutory scheme. The Legislature certainly did not intend the word "treatment," as used in section 361.5(b)(13), to be construed in a way that would permit substance-abusing parents to prolong their access to reunification services, and defer the permanent placement of their children, by the simple expedient of failing to undergo a drug abuse assessment.

As the court recognized in *D.B. v. Superior Court*, *supra*, 171 Cal.App.4th 197, what is at issue in applying the statute is "whether a parent's failure to comply [with a treatment order] signifies a substance abuse problem so intractable that the provision of reunification services would be a waste of time." (*Id.* at p. 204.) Failure to comply with an order to complete a drug abuse assessment, which the court has imposed as a first step in the direction of treatment, shows that the parent's problem is at least as intractable, if not more so, as that of a parent who fails to complete actual treatment. Accordingly, the dependency court did not err in concluding that parents had failed to comply with a drug treatment program within the meaning of section 361.5(b)(13).

DISPOSITION

The order denying reunification services and setting the section 366.26 hearing is affirmed, and the petitions are denied. This decision is final as to this court immediately. (Cal. Rules of Court, rule 8.490(b)(3).) In light of our disposition, the request for a stay of the section 366.26 hearing set for August 2, 2010, is denied as unnecessary. The order to show cause is hereby discharged.

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RUVOLO, P. J.

We concur:

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REARDON, J.

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RIVERA, J.